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THE WAGES OF FEDERAL EMPLOYEES: CAN WE TALK?

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

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38TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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# THE WAGES OF FEDERAL EMPLOYEES: CAN WE TALK?

by Captain Natalie L. Griffin

ABSTRACT: This thesis examines the negotiability of wages for federal sector employees. Wages may be negotiable for those employees whose salaries are not specifically set by statute. This thesis examines the recent case law and the language and legislative history of the Federal Service Labor-Management Relations Statute. This thesis concludes that wages are a "condition of employment" and may be subject to collective bargaining.

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## I. INTRODUCTION.

As long as management and labor sit across a table from each other they will disagree. The problem becomes even more complex when they not only disagree over the topic of discussion, but also disagree over whether to discuss the topic at all. The salaries of federal employees have long been such a topic. This paper will review the question whether union proposals concerning the compensation of federal employees are topics for discussion.

Recent cases are divided in their holdings and yet uniform in the questions they have examined.<sup>1</sup> The issues are clearly threefold. First, whether compensation of federal employees whose rates of compensation are not specifically set by statute is a negotiable "condition of employment."<sup>2</sup> Second, whether bargaining proposals which involve compensation of employees are non-negotiable because they interfere with the agency's management right to determine its budget.<sup>3</sup> Third, whether the duty to bargain over wages is inconsistent with federal law or government-wide rules or regulations, or alternately with agency rules or regulations for which a compelling need exists.<sup>4</sup>

It has been the position of various federal agencies that these types of proposals are not negotiable.<sup>5</sup> The Federal Labor Relations Authority (FLRA) has insisted that they are indeed negotiable. Judicial circuits that have considered the question are equally divided in their response. Most recently the question was addressed to the United States Supreme Court.<sup>6</sup>

#### A. COLLECTIVE BARGAINING IN THE FEDERAL SECTOR

In order to understand the positions of the various players, the authority under which they operate and their roles in the process must be analyzed. There is one underlying theme to this collective bargaining process which cannot be disputed--collective bargaining is favored. In 1978 the Federal Service Labor-Management Relations Statute was enacted as Title VII of the Civil Service Reform Act.<sup>7</sup> Congress was unequivocal in its statement of purpose. Congress stated:

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . .

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.<sup>8</sup>

Government agencies are tasked to engage in collective bargaining with their employees through the employees' exclusive representative.<sup>9</sup> This duty to bargain is a duty to "bargain in a good-faith effort to reach agreement with respect to the conditions of employment."<sup>10</sup> Case law is replete with examples of "conditions of employment" that are proper subjects for negotiation.<sup>11</sup> There is still much room for argument, as evident from the discussion herein, over what the term "conditions of employment" means. The statute defines conditions of employment as:

(14) . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--  
(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;



(B) relating to the classification of any position, or

(C) to the extent such matters are specifically provided for by Federal statute[.]<sup>12</sup>

Collective bargaining is in the public interest, and government agencies must bargain in good faith over "conditions of employment." Congress, however, recognizing the need for the federal government to function efficiently and effectively, placed limitations on the duty to bargain. The obligation to bargain in the federal sector is not as comprehensive as the private sector. There is no duty to bargain over matters which conflict with federal law or a government-wide rule or regulation, or an agency rule or regulation for which a compelling need exists.<sup>13</sup> There is also no duty to bargain over those areas known as management rights. These include among other things the agency's authority to "determine the mission, budget, organization, number of employees, and internal security practices of the agency . . ."<sup>14</sup>

#### B. THE ROLE OF THE FEDERAL LABOR RELATIONS AUTHORITY

Agencies must engage in good-faith bargaining with their employees over matters which are proper "conditions of employment." Agencies are not obligated to bargain over "matters specifically provided for by Federal statute." Nor must they bargain over matters

which are the subject of a government-wide rule or regulation, or an agency-wide rule or regulation for which a compelling need exists. Agencies are further not obligated to bargain over management rights.

Agencies and their employees are not always in agreement concerning where the line of negotiability is drawn. Is it a "condition of employment?" Is it a management right? The role of the FLRA, a three-member independent, bipartisan body appointed by the President, is to "resolve issues relating to the duty to bargain in good faith[.]"<sup>15</sup>

A federal agency may refuse to bargain altogether by alleging that the duty to bargain does not extend to a particular matter. In that case the exclusive representative of the employees may appeal the agency's allegation of nonnegotiability to the FLRA.<sup>16</sup> The final decision of the FLRA is appealable to the courts of appeals.<sup>17</sup> The role of the FLRA is analogous to the National Labor Relations Board (NLRB) in the private sector. The FLRA like the NLRB was to "develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Federal Service Labor-Management Relations Statute."<sup>18</sup>

The parties may initially agree to bargain but then cannot reach agreement. The parties have an obligation to bargain until they reach an impasse. When such an impasse is reached it may be resolved by either party requesting the Federal Service Impasse Panel to consider the matter, or the parties may agree to adopt binding arbitration of the negotiation impasse

if approved by the Panel.<sup>19</sup> Quite simply, the FLRA is the umpire between agencies and unions ensuring that both sides are carrying out their obligations under the federal labor relations program.

## II. THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (FSLMRS)--CONGRESSIONAL INTENT

### A. LEGISLATIVE HISTORY

The guiding principles of collective bargaining in the federal sector can be found in the FSLMRS. An examination of the statute and its legislative history should clarify whether Congress intended wages to be a matter for collective bargaining. The intent of Congress, however, is far from specific. This is supported by the fact that judicial circuits examining the question are equally divided. There are two issues to examine in reviewing the intent of Congress. One is the general intent which is evident from the rhetoric during the floor debates prior to passage of the statute. The other is the more specific intent which requires an examination of the language of the statute and the history of that language.

There are many statements which seem to indicate Congressional disfavor with the proposition that wages are negotiable in the federal sector. Congressman Udall, the proponent of the compromise bill which eventually became the FSLMRS, stated:

There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement--the kinds of things that are giving us difficulty in the Postal Service today. All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action.<sup>20</sup>

Congressman Ford also stated, " [N]o matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement."<sup>21</sup> The House Report which accompanied the bill stated, "employees, through their unions, [will] be permitted to bargain with agency management throughout the executive branch on most issues, except that federal pay will continue to be set in accordance with the pay provisions of title 5."<sup>22</sup>

While the above statements seem to indicate a blanket disapproval of wages as a negotiable matter, there were other views expressed. Congressman Clay, who supported Rep. Udall's compromise legislation, stated:

Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear

understanding that only matters  
"specifically" provided for by statute would  
be excluded under this subsection. Thus,  
where a statute merely vests authority over a  
particular subject with an agency official  
with the official given discretion in  
exercising that authority, the particular  
subject is not excluded by this subsection  
from the duty to bargain over conditions of  
employment.<sup>23</sup>

The differing statements begin to devolve into two  
different analyses. If only the sentiments of  
Congressmen Udall, Ford, and a few others are  
considered, absent the statutory language and its prior  
history, then the proposition is easily supported that  
wages are not negotiable. It is a one-part analysis--  
a theory that stands alone. If, however, the  
statements of all the Congressmen, specifically  
Congressman Clay, are considered along with the  
statutory language and the history of the negotiability  
of wages prior to 1978, then a two-part analysis begins  
to emerge. Wages are not per se nonnegotiable, but  
only if "specifically provided for by Federal statute."

This distinction is evident from the analysis  
engaged in by the courts which have considered the  
question. The Third Circuit considered the legislative  
history to be "replete . . . with indications that  
Congress did not intend to subject pay of federal  
employees to bargaining."<sup>24</sup> The Eleventh Circuit,

however, stated, "although some legislators remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRS would not supplant specific laws which set wages and benefits."<sup>25</sup>

#### B. FEDERAL EMPLOYEES AND THE POTENTIAL FOR WAGE NEGOTIATIONS

The application of the two-part analysis is accepted for the great majority of employees in the federal workplace. There is no duty to bargain over "conditions of employment" that are "specifically provided for by Federal statute." The wages and benefits of the majority of federal employees are set by federal statutes providing for pay and benefits, i.e. the General Schedule which establishes pay rates.<sup>26</sup> There is no argument, and all parties in the recent case before the Supreme Court conceded, that approximately ninety-seven percent of the federal workforce have their salaries set by law.<sup>27</sup> Therefore, ninety-seven percent of the federal workforce may not negotiate over wages.

Proponents of the theory that wages are not negotiable read the all-encompassing statements of some legislators to apply to all federal employees. Those who support the negotiability of wages assert that the statements are overly broad because legislators were referring to such a large majority of federal employees (ninety-seven percent). It was difficult not to overstate the obvious. As the Eleventh Circuit

reasoned, it was mere assurances to other Congressmen that the FSLMRS did not intend to supplant specific laws which provided for the wages and benefits of the great majority of federal employees.<sup>28</sup> The two-part test is fulfilled by so many federal employees that there is a tendency to forget that there are two parts. In other words, the proposition that wages are nonnegotiable because they are predominantly set by federal statute becomes the singular principle that wages of federal employees are nonnegotiable.

#### C. LEGISLATIVE AUTHORIZATION

Did Congress consider the question whether wages should be negotiable? Yes, and on two separate occasions replied in the negative. Congressman Ford introduced a bill that would make pay a negotiable item for federal employees and it was not passed.<sup>29</sup> Representative Heftel later introduced a proposal that would have allowed negotiation over "pay practices" and "overtime practices . . . consonant with law and regulation."<sup>30</sup> These unsuccessful attempts to extend bargaining are viewed with particular significance because "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."<sup>31</sup> Again, supporters of the negotiability of wages for certain federal employees do not find this argument persuasive. They claim that rejection of these proposals does not signify Congressional intent

to make all pay matters per se nonnegotiable. The fact that Congress did not want to extend the ability to negotiate over wages to the entire federal workforce does not foreclose the possibility for a minority. Indeed, there were many other matters listed in the rejected proposals, such as promotion procedures and safety matters, which are clearly negotiable today. Therefore, rejection of these proposals could not have rendered all matters contained therein nonnegotiable.<sup>32</sup>

Did Congress intend to sweepingly restrict from negotiability the issue of pay and benefits for all federal employees and not just the ninety-seven percent who are excluded by virtue of conflicting federal statutes? Congressman Clay stated, "employees still . . . cannot bargain over pay."<sup>33</sup> Congressman Devinski stated that wages and fringe benefits remained beyond the scope of collective bargaining.<sup>34</sup> The Eleventh Circuit read such statements as a demonstration that Congress intended to continue existing practice regarding the negotiation of wages.<sup>35</sup> Can these statements be reconciled with existing practice? Were no federal employees allowed to negotiate over wages and benefits? The fact is that prior to adoption of the FSLMRS there were federal employees who were allowed to bargain over their wages.

### III. HISTORY OF BARGAINING OVER WAGES IN THE FEDERAL WORKPLACE PRIOR TO THE CIVIL SERVICE REFORM ACT OF 1978

#### A. ESTABLISHMENT OF A GOVERNMENT-WIDE LABOR RELATIONS PROGRAM



As far back as 1949 federal employees were allowed to bargain over their wages. Congress at that time exempted skilled craft workers and semiskilled manual laborers from the Classification Act, which then set federal employees' pay.<sup>36</sup> Additionally, the Bureau of Reclamation in the Department of Interior has voluntarily bargained with employees over wages since the late 1940's.<sup>37</sup>

In 1961 President Kennedy established a special Task Force on Employee-Management Relations in the Federal Service and gave them as their assignment the formulation of government-wide policy on labor-management relations. The Task Force noted that the more similar a government activity was to a private activity which was unionized, the more often the government activity would be similarly organized. Additionally, the relationships between management officials and workers in those activities would mirror the relations in private industry. Thus, they found "in the Tennessee Valley Authority and various units of the Department of Interior, relationships that [were] close to full scale collective bargaining between trade unions and management officials [had] been going on for years, to the complete satisfaction of all the parties concerned."<sup>38</sup>

The Task Force examined the scope of consultations and negotiations with employee organizations. They noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or

most fringe benefits. These are established by law."<sup>39</sup>  
They then recommended:

Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor-employee relations, work shifts and tours of duty, grievance procedures, career development policies, and where permitted by law the implementation of policies relative to rates of pay and job classification. This list is not, of course, all-inclusive, nor should it be expected that every agency will feel free to negotiate in all such areas.<sup>40</sup>

In a statement by President Kennedy accompanying the Task Force recommendations he directed that an Executive order be prepared to give effect to their recommendations. He stated, "where salaries and other conditions of employment are fixed by Congress these matters are not subject to negotiation."<sup>41</sup> The two-part analysis is evident in the Task Force's recommendations and President Kennedy's endorsement of them. Thus those who support the negotiability of wages point to the prior history of government-wide labor relations program. They submit that those who developed the program intended wages to be negotiable "conditions of employment" unless otherwise set by Congress.<sup>42</sup>

B. EXECUTIVE ORDERS AND THE FEDERAL LABOR  
RELATIONS COUNCIL

The conduct of labor relations in the federal sector from 1962-1978 was guided by principles established by a succession of Executive Orders.<sup>43</sup> Also established by one of those Executive Orders (No. 11,491) was the Federal Labor Relations Council (FLRC). It was the predecessor of the Federal Labor Relations Authority (FLRA) as it also had the authority to resolve disputes concerning the negotiability of collective bargaining proposals.<sup>44</sup>

The FLRC considered the issue of negotiability of wages in two cases. In one case the FLRC held that teachers at the Merchant Marine Academy could bargain over their wages because they were exempt from the Classification Act, which set federal wages at the time, and their proposals did not conflict with federal law giving discretion to the Secretary of Commerce to set their salaries.<sup>45</sup> In the other case the FLRC held that pay proposals involving procedures and formulas for setting teacher compensation were negotiable because they did not conflict with the Overseas Teachers Pay and Personnel Practices Act.<sup>46</sup>

The history of bargaining over wages under Executive Order 11,491 is undisputable. This past practice was recognized and intended to be continued after 1978. Representative Derwinski indicated that Title VII was to codify existing practices developed under the Executive orders when he stated:

[T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now with their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.

The substance of this amendment closely resembles the original program established by President Kennedy.<sup>47</sup>

The Senate Report stated, " [t]he scope of negotiations under this section is the same as under section 11(a) of Executive Order 11,491.<sup>48</sup> The enactment of the FSLMRS "constitute[d] a strong congressional endorsement of the policy on which the Federal labor relations program had been based since its creation in 1962."<sup>49</sup> In light of such statements by Representative Clay that "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [FLRC]", it does not follow that Congress intended to restrict, but rather expand, the scope of collective bargaining that existed under the Executive orders.<sup>50</sup>

Proponents of the nonnegotiability of wages assert that because the FLRC decisions were not mentioned in the legislative history Congress was unaware of them.<sup>51</sup>

To the contrary, Congress is generally presumed to know the law as it pertains to legislation they enact.<sup>52</sup> If a new law is adopted which incorporates sections of a prior law, Congress is presumed to know the judicial and administrative interpretations of the incorporated law.<sup>53</sup> The Eleventh Circuit noted that prior to enactment of the FSLMRS:

[E]xisting practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits. . . . Congress should have known of this practice because the FSLMRS specifically mandates that decisions under Executive Order 11491 continue in effect unless superceded; the FLRC administered the [two decisions allowing negotiations over wages] under this Executive Order. 5 U.S.C. 7135(b) (1980).<sup>54</sup>

#### C. PREVAILING WAGE RATE EMPLOYEES

Were any other federal employees allowed to bargain over their wages prior to enactment of the FSLRMS? Yes, those employees who had historically negotiated over their wages under the prevailing rate system. Can one argue Congress was also unaware of these employees' ability to bargain? That is unlikely as they specifically addressed the practices of these employees during debate on the FSLMRS. Rep. Ford

offered the amendment which was "intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. . . . Certainly, we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees."<sup>55</sup>

Congress was aware of the bargaining practices of these employees in 1972 when they enacted the prevailing rate system. They included a clause allowing those employees who had historically negotiated over matters regarding "wages, . . . terms and conditions of employment, and other employment matters" to continue to negotiate over those same matters.<sup>56</sup> The Civil Service Reform Act also incorporated a saving clause for prevailing rate employees allowing those who had historically bargained over their wages and benefits to continue to do so.<sup>57</sup>

Review of the legislative history of the FSLMRS and prior Executive Orders does not support those all-encompassing statements of some legislators that "there is nothing in this bill which allows federal employees the right to . . . negotiate over pay and money-related fringe benefits."<sup>58</sup> There was specific legislation allowing wage negotiations by prevailing rate system employees. There was a mandate under the FSLMRS that decisions under Executive Order 11491 continue in effect unless superceded. In addition, two FLRC decisions under that Executive Order allowed wage negotiations. In fact, during oral argument before the Supreme Court, the Acting Solicitor General, who had argued in his brief that Congress was unaware of those

cases, made a concession to Justice Sandra Day O'Connor. He conceded that one of the FLRA's "strongest arguments" was that the FLRA's predecessor, the FLRC, had issued those two decisions upholding the obligation to bargain under that Executive Order over money items within an agency's discretion.<sup>59</sup>

The correct approach to the question of the negotiability of wages is the two-part analysis. This is evident from the statutory language and its legislative history. It is an incomplete analysis if one accepts the "bald assertions" of a few Congressmen that wages are not negotiable. Thus, wages are a negotiable "condition of employment" if not "specifically provided for by Federal statute." The next obstacle to this analysis is that wages are not by definition a "condition of employment."

#### IV. "CONDITIONS OF EMPLOYMENT"

##### A. LEGISLATIVE HISTORY AND COMPARABLE STATUTES

A review of Congressional intent requires not only an examination of the general intent of Congress based on past practice and prior legislation, but also the specific language of the statute. The general duty to bargain in good faith over "conditions of employment" can be superceded by a showing that a matter is not a "condition of employment." This is the argument of proponents of the nonnegotiability of wages, that the past history under the Executive Orders and the cases

of the FLRC have indeed been superceded by a different definition of "conditions of employment".

Collective bargaining in the federal workplace extends to "conditions of employment" which are defined as "personnel policies, practices, and matters . . . affecting working conditions."<sup>60</sup> The basic proposition is that if Congress had wanted to include wages they would have so stated. The definition of "condition of employment" is presented as a one-part analysis. The argument notes that other statutes that include wages as a negotiating matter specifically include the term "wages". The NLRA in the private sector authorizes bargaining over "wages, hours, and other terms and conditions of employment."<sup>61</sup> The Third Circuit accepted this argument and noted that "Congress's use of only 'conditions of employment' implies a narrower range of bargainable matters under the Labor-Management Statute than under the NLRA."<sup>62</sup> In the Postal Reorganization Act Congress expressly granted postal workers the right to bargain over "wages, hours, and working conditions."<sup>63</sup> The distinction is made that wages are terms and hours of employment are conditions.

First, the concept that the NLRA somehow makes a distinction between wages, hours, terms, and conditions is simply erroneous. In the section on "Findings and declaration of policy" Congress specifies wages and hours as the two basic "working conditions". Congress stated that collective bargaining promotes commerce by encouraging "friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions."<sup>64</sup> Further, the NLRA provides that



labor representatives shall be exclusive representatives of all unit employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."<sup>65</sup> Both the courts and the National Labor Relations Board have recognized what is clear even in the dictionary, that terms and conditions are synonymous, and therefore include wages as "conditions of employment."<sup>66</sup>

There are federal statutes which appear to include pay matters as "conditions of employment." The Senior Executive Service Act provides for a "compensation system, including salaries, benefits, and incentives, and for other conditions of employment."<sup>67</sup> The law covering federal prisoners on work-release provides for "the rates of pay and other conditions of employment."<sup>68</sup> These statutes are dismissed by those who do not include wages in the term "conditions of employment" as the statutes do not expressly define wages as a "condition of employment."<sup>69</sup>

"Conditions of employment" is defined as "personnel policies and practices and matters . . . affecting working conditions."<sup>70</sup> That language was taken from the Executive Orders which first implemented a government-wide labor relations program. President Kennedy's Task Force viewed "where permitted by law . . . policies relative to rates of pay" to be a proper subject for collective bargaining."<sup>71</sup> President Kennedy noted that "where salaries and other conditions of employment are fixed by Congress these matters are not subject to negotiation."<sup>72</sup> However, if not fixed by

Congress, these matters were the proper subject for negotiation. Thus President Kennedy's Executive Order authorized negotiations over "personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements."<sup>73</sup> President Nixon retained the same language in Executive Order No. 11,491.<sup>74</sup> It was under this Executive Order that the FLRC in those two decisions concerning the negotiability of wages read the above language to include pay.<sup>75</sup> One can make the assumption under the rules of statutory construction that when Congress codified the language of Executive Order 11,491 without change, that it knew of and did not intend to change the judicial and executive interpretation of that language.<sup>76</sup>

B. "CONDITIONS OF EMPLOYMENT" AS PHYSICAL  
CONDITIONS

The additional argument of those who do not support the negotiability of wages is that the language "conditions of employment" should be read to refer to the physical conditions under which an employee labors.<sup>77</sup> As the District of Columbia Circuit stated, "[t]he term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job."<sup>78</sup> This argument simply cannot be supported when to limit "conditions of employment" to the physical conditions under which an employee works would exclude the great majority of matters currently negotiated by unions representing

federal workers. Such a definition would exclude personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by Section 7121(a)(1). Such a limited definition would exclude negotiation over every area except safety and office environment.<sup>79</sup> This is simply not the case.

C. INTERPRETATION OF THE STATUTE AND THE  
DEFERENCE DUE THE FEDERAL LABOR RELATIONS  
AUTHORITY

There have been different definitions given to "conditions of employment", but it is also important who is making the interpretation. The FLRA has consistently read "conditions of employment" in the broad sense. They have not been willing to assign the restrictive definition argued by various federal agencies. Does the interpretation of the FLRA hold more weight than that of other federal agencies? As noted, Congress assigned the FLRA the task of developing special expertise in the area of labor relations, and to use that expertise to give content to the principles and goals in the FSLMRS.<sup>80</sup> The FLRA is "entitled to considerable deference when it exercises its 'special function of applying the general provisions of the [FLRMRA] to the complexities' of federal labor relations."<sup>81</sup>

When the FLRA is exercising its special expertise, its decisions and orders should not be set aside unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>82</sup> Also, the FLRA's findings of fact are conclusive "if supported by substantial evidence on the record considered as a whole."<sup>83</sup> Those who disagree with the FLRA on a particular interpretation are quick to point out that "while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling act . . . they must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'"<sup>84</sup> It is correct that the FLRA's interpretation of another agency's enabling act is not entitled to the deference accorded the FLRA's interpretation of its own enabling act.<sup>85</sup> But it is also correct that FLRA interpretations of statutes other than the Civil Service Reform Act are entitled to deference where "interpretation bears directly on the 'complexities' of federal labor relations."<sup>86</sup>

A discussion of the interpretation of the term "condition of employment" is a discussion of the enabling act of the FLRA, the FSLMRS. The interpretation of the FLRA that wages are included in the definition of "conditions of employment" is reasonable. During argument before the Supreme Court, Justice O'Connor noted, "The term 'conditions of employment' is not self-explanatory. Why should we not defer to the administrative agency's construction of

its own statute?"<sup>87</sup> Justice Harry Blackmun also observed that the rule of deference to an administrative agency's interpretation of its own statute was "a great big mountain you have got to get across."<sup>88</sup>

It is indeed a great mountain to get across. The reading of the FLRA of the term "conditions of employment" does not have to be persuasive only merely reasonable. It does not have to be a better or even an equally persuasive argument under the deference due the FLRA, just reasonable. Management in the recent argument before the Supreme Court did argue that the reading of the FLRA was unreasonable. They argued that due to the slight variation in the drafting of the Civil Service Reform Act that the FLRA was not entitled to deference.<sup>89</sup> This is the distinction that wages are terms of employment and hours are conditions of employment. The terms versus conditions of employment distinction is an obscure one at best, and is supported by virtually no authorities.<sup>90</sup> It is an argument which cannot overcome the minimal requirements of mere reasonableness that the FLRA's interpretation has to meet.

#### V. MANAGEMENT'S RIGHT TO SET THE BUDGET.

##### A. INTERFERENCE WITH MANAGEMENT RIGHTS

If one accepts that wages are indeed "conditions of employment" and therefore a proper subject for negotiation, then the next obstacle to negotiation is

interference with a management right. Proponents of nonnegotiability contend wages should be excluded from collective bargaining because it interferes with management's right "to determine the . . . budget . . . of the agency."<sup>91</sup> Are management rights to be a significant limitation on the obligation to collectively bargain? Rep. Clay stated that "the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith."<sup>92</sup> The House Committee on the Post Office and Civil Service stated:

The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program . . . The committee intends that section 7106 . . . be read to favor collective bargaining whenever there is a doubt as to the negotiability of a subject or proposal.<sup>93</sup>

If the intention was that the reading of management rights be more narrowly construed than the previous Executive Orders, what was the construction of the term previously? Both Executive Order No. 10,988 and Executive Order No. 11,491 contained provisions allowing an agency to determine its budget. One provided that the agency's bargaining obligation "shall not be construed to extend to such areas of discretion and policy as the mission of the agency, [or] its

budget . . . "94 The other followed with "the obligation to meet and confer does not include matters with respect to the mission of the agency; [or] its budget . . . "95

The management rights clause under Executive Order 11,491 did not prohibit negotiations over wages. It was under that Executive Order that the FLRC allowed negotiations over wages in two separate cases. In fact Rep. Ford complained that the FLRC interpretation of the management rights clause under Executive Order 11,491 "stifle[d]" collective bargaining and thus Section 7106 should be "construed strictly."<sup>96</sup> Thus collective bargaining was allowed under the previous management rights clauses. Section 7106 is to be construed more narrowly than the clauses under the Executive Orders. Furthermore, if there is doubt it is to be resolved in favor of collective bargaining. Therefore, it is does not appear that the obstacle of management rights is a limitation on the negotiation of wages.

#### B. BALANCING COSTS AND COMPENSATING BENEFITS

The FLRA has determined that management rights are hindered only when an agency has demonstrated that a union proposal would "directly interfere" with one of those rights.<sup>97</sup> There is a balance which must be struck between protecting only "genuine managerial prerogatives" and not "negat[ing] the Act's broad duty to bargain."<sup>98</sup> The FLRA has devised a test which they believe strikes this balance. First, the FLRA has

rejected the proposition that simply because a proposal would impose costs that it interferes with the management right to set the budget. They have stated:

Such a construction of the Statute could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most . . . would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.<sup>99</sup>

One Circuit has held that an agency cannot rely on monetary considerations or even economic hardship as a reason for refusing to bargain.<sup>100</sup>

The test the FLRA has devised to show interference with an agency's budget is twofold. To establish interference "the agency must show that the proposal "attempts to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them," or where a proposal does not so attempt, the agency must "make[] a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits."<sup>101</sup> Examples of such benefits are improved employee performance, increased productivity, reduced turnover, and fewer grievances.<sup>102</sup>



This weighing of cost against compensating benefits is an amorphous concept. In the cases which have unsuccessfully advanced the argument that management's right to determine its budget precludes negotiation over wages, the test has not been fully applied.<sup>103</sup> That is because in each case the FLRA made a factual finding that the agency did not meet either prong of the test. More specifically, the FLRA did not find that the agency presented evidence which would demonstrate that the proposals would cause substantial and unavoidable cost increases. Thus no weighing test took place. The factual findings of the FLRA are accepted as long as the record as a whole provides substantial evidence to support such findings.<sup>104</sup> Because no agency has ever provided the Authority with data in a budget case, the Authority has not issued a decision implementing the compensating benefits aspect of the budget test.<sup>105</sup>

The argument that negotiation over wages would interfere with the management right to set the budget has been successful in one case. The Fourth Circuit was critical of the FLRA test in its opinion. They noted that the FLRA had found that the agency had failed to demonstrate that increased costs were not offset by compensating benefits. They continued "nothing in the Statute requires that this showing be made to the satisfaction of the FLRA. As applied to employee compensation, the FLRA's test makes itself, not the agency, the arbiter of the agency's budget."<sup>106</sup>

This requirement of proof by the FLRA is criticized by management as unreasonable. It is

criticized because it requires an agency to prove a negative--a requirement that could seldom be satisfied. In the case recently argued before the Supreme Court the union suggested that the compensating benefit would be that higher salaries and improved benefits would "attract better, hard-working teachers."<sup>107</sup> This intangible benefit analysis was also questioned by Justice Antonin Scalia during oral argument. Justice Scalia stated that he could not understand this aspect of the Authority's cost-benefit analysis test. He questioned how an intangible and supposedly unquantifiable benefit, such as an improvement in morale, can be placed on the scale in opposition to an employer's claim that the increased cost of a proposal infringes upon its reserved right to set its budget.<sup>108</sup> There is no clear line over which a union proposal steps in this area. The Acting Solicitor in Fort Stewart Schools v. FLRA, in response to Justice John Paul Stevens' question as to whether a union proposal had to be cost free, conceded that the line had yet to be set. He noted that the threshold beyond which a union proposal's costs grow to the point where they affect an agency's budget has yet to be determined in case law. Yet he argued that in the instant case it was over the threshold, wherever it was.<sup>109</sup>

The FLRA argues that the cost/benefit analysis is one used frequently in both the private and public sectors.<sup>110</sup> They argue that the test is a good one. It should be allowed to develop in case law, and not be fought by employers.<sup>111</sup> The test was first developed in the Wright-Patterson case where the issue was not wages

but a day care center. The employer, the Air Force, opposed the proposal as costing too much and therefore interfering with the agency's ability to set its budget. The FLRA ruled that the mere cost was not enough to make the proposal nonnegotiable, but that the employer would have to show "that an increase in costs is significant and unavoidable and is not offset by compensating benefits."<sup>112</sup>

Balancing intangibles in a case of building a day care center does not seem inappropriate, but balancing improved morale against wage increases is a very tenuous proposition. However, if one reads the legislative history to allow wage negotiations where Congress has not set specific laws, then it would not be appropriate for Congress to then not allow wage negotiations through the back door of management rights. The problem seems to be the test the FLRA has devised. There could be a balancing of interests, but the entire burden should not fall on the agency. The agency would have to show that there would be significant and unavoidable costs. These costs would have to be computed and compared to the overall budget of the agency. The agency should not be allowed to merely point to the initial costs and say there are no compensating benefits. On the other hand, the agency should not have to prove a negative. It is absurd for the union to be able to advance that employees would be happier if they were paid more, and the agency must prove they wouldn't be happier. Perhaps a shifting of the burden from the agency to the union to show the compensating benefits would be more appropriate. Then

the agency still has the ultimate ability to determine their budget by accepting or not accepting the arguments of the union.

### C. BUDGET OF THE AGENCY

The only agency which successfully made a showing that the cost increase would have a significant and unavoidable impact was a small agency. The Fourth Circuit found that salaries and benefits of the Nuclear Regulatory Commission (NRC) constituted more than forty percent of the NRC's annual budget. This amount would significantly affect the NRC's operations.<sup>113</sup> The Army was not so fortunate in its argument before the Eleventh Circuit. That court found "any increase in the employees' salaries would not significantly increase the Army's budget; the Army concedes that its budget includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools."<sup>114</sup>

The argument was advanced that whether a proposal has a significant impact should be tested by comparison with the expenditures of the particular program employing the bargaining unit employees, not the entire agency budget.<sup>115</sup> However, the pertinent language states that "nothing in this chapter shall affect the authority of any management official of any agency--to determine the . . . budget . . . of the agency."<sup>116</sup> And "agency" is defined by the statute as "an Executive agency."<sup>117</sup> For large Executive agencies the budget

right could be argued to be an illusory one. This could not have been the intent of Congress.

D. AGENCY CONTROL OF THE BUDGET VERSUS OUTSIDE AGENCY CONTROL

An argument can be made under the management right to determine its budget that mandatory negotiation is simply inconsistent with that principle. Recall that if parties cannot continue to bargain in a good faith effort, they have reached an impasse. At that time they may request the Federal Services Impasse Panel to consider the matter and may agree to adopt binding arbitration.<sup>118</sup> The possibility then exists that an outside agency could be setting the budget of the agency.

This possibility of outside control over the budget of an agency was the turning point for the case which successfully advanced the management right theory. The NRC was faced with a proposal that salaries would be:

"adjusted for the cost of living/ comparability factor. The adjustment will be equal to the statistical adjustment recommended to the President by the [Advisory Committee on Federal Pay, see 5 U.S.C. Sec. 5306]. This adjustment will become effective at the announcement of it by the [Committee] or other appropriate sources. It will be

unaffected by Presidential or Congressional actions.<sup>119</sup>

The Fourth Circuit noted that if the union's salary proposal went into effect it would "divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay. . . . [T]he NRC would be obligated to adjust its employees' wages and salaries each time the Advisory Committee on Federal pay recommends a general increase in federal salaries."<sup>120</sup> The court was very clear that Congress vested the responsibility of balancing employee compensation against the agency's other goals with the NRC, and not the FLRA or the Advisory Committee on Federal Pay.<sup>121</sup>

The proposal above illustrates that while it is not clear where the line is drawn, it is possible to cross it. "Although Title VII imposes a broad duty to bargain, it also demarcates an area of management prerogative which Congress protected in order 'to preserve the Federal Government's ability to operate in an effective and efficient manner.'"<sup>122</sup> This has clearly been the battle cry, that negotiation over wages in the federal sector would somehow bring down the government. But there has been negotiation in the federal sector for many years, with no resultant toppling of any government duly elected.

## V. PAY SCHEMES FOR FEDERAL EMPLOYEES.

### A. PREVAILING RATE EMPLOYEES

The third argument centers around the type of statute or regulation that authorizes the pay of federal employees not covered by the General Schedule. The arguments concern employees who are paid under prevailing wage rate determinations and also employees paid under other statutes or regulations.

The distinction can be drawn between salaries paid under a prevailing wage determination and other types of pay schemes because the Congressional intent was clear in one instance. The legislative history of the prevailing wage rate statute shows clear Congressional intent to allow some bargaining over wages. Some employees covered by the prevailing rate system had historically bargained over their wages. Congress was aware of the practices of those employees when they enacted the prevailing rate system in 1972. Section 9(b) of the Prevailing Rate Act allowed those employees who had traditionally bargained over their wages to continue to negotiate. Section 704 of the 1978 Civil Service Reform Act also continued this practice. It was Rep. Ford who offered the amendment "intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. . . ." <sup>123</sup>

This "grandfather" clause was necessary because of two Comptroller General decisions stating specific legislation was needed to continue this practice of negotiation over wages. It was also necessary because prevailing wage employees would not be able to continue to negotiate over wages under the FSLMRS as their pay would be "specifically provided for by Federal

statute," namely the Prevailing Rate Act.<sup>124</sup> The clause allowing employees to bargain applies only to those who historically could bargain prior to 1972. Thus those employees who did not bargain over wages prior to 1972 and who are covered by the Prevailing Rate Act may not now bargain over wages.<sup>125</sup>

Congress intended to preserve the rights of those who could bargain under the Executive Orders at a minimum in this area of prevailing wage determinations. It is possible that they also intended all employees who had the ability to bargain under the Executive Orders be allowed to continue such negotiations. They certainly, however, did not foreclose bargaining to all employees. The broad language used by a few Congressmen during debates on passage of the FSLMRS is inconsistent with their discussions and knowledge of the prevailing wage rate employees.

#### B. OTHER STATUTORY AND REGULATORY PAY SCHEMES

There are federal pay statutes other than those outlined under the prevailing wage rate determinations.<sup>126</sup> These other statutes have vested varying degrees of discretion in the agencies responsible for setting pay. Many agencies operating under these federal pay schemes have supplemented them with internal agency regulations. It is possible for an agency which cannot show the wages of its employees to be "specifically provided for by Federal statute," to show that they are the subject of an agency regulation for which there is a compelling need. If a



compelling need for the regulation exists, then the matter is outside the obligation to bargain.<sup>127</sup> This requirement originated under Executive Order 11,491 because agencies were unduly restricting the obligation to bargain by implementing agency regulations.<sup>128</sup>

The FLRA has been tasked with the responsibility of making determinations whether a compelling need exists for an agency's regulation.<sup>129</sup> The FLRA has also been charged with creating regulations that prescribe the requirements an agency regulation must meet in order to establish a compelling need.<sup>130</sup> The FLRA has prescribed that a compelling need exists if one or more of the following criteria are met:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.<sup>131</sup>

The FLRA is entitled to great deference when interpreting its regulations which explicitly implement policies established by Congress or the executive.<sup>132</sup> Additionally, the burden for establishing that a compelling need exists rest with the agency responsible for the regulation.<sup>133</sup> It is not the responsibility of the FLRA to determine what agency purposes a regulation is designed to achieve or of what importance a regulation is to an agency.<sup>134</sup>

Therefore, it is important to examine the specific authority under which employees in a particular agency are paid to determine whether it will bar negotiations over wages. Obviously, the clearest case is employees paid under the General Schedule, as they have their pay "specifically provided for by Federal statute." Those employees who are paid under the Prevailing Wage Rate Act must determine whether they were historically able to negotiate over wages. If so, then the saving clause of section 704 of the Civil Service Reform Act allow them to continue. If they were not able to negotiate prior to 1972, then by negative implication they are now foreclosed from negotiating.<sup>135</sup> Agencies under other federal pay schemes must establish on a case by case basis that their pay rates are "specifically provided for by Federal statute." Each statute must be examined to determine the discretion which has been vested in that particular agency to set pay rates. Finally, the agency may attempt to show that although not "specifically provided for" the agency has implemented a regulation to achieve their pay scheme for which a compelling need exists. If any of the above conditions

exist, then an agency has met the second part of the two-part analysis and is not obligated to negotiate over wages.

It is not a difficult task to determine that employees may not negotiate over their pay because their salaries "are provided for by Federal statute." It is not difficult to determine if employees are covered by the Prevailing Wage Rate Act, and if so whether they were historically able to negotiate over their pay. The difficulty arises with determining the amount of discretion vested in a particular agency to set pay rates, or if embodied in a regulation whether a compelling need exists for such a regulation. Such determinations will require an individual review of the cases which have examined the question of the negotiability of wages.

## VI. CASE LAW ANALYSIS

The cases which have been considered at the appellate level have all been decided in the past few years, therefore a review of the cases in a chronological fashion is not particularly helpful in understanding the courts' rationale. A review of the cases grouped by the particular type of pay scheme they operate under is more beneficial.

### A. PREVAILING WAGE RATE CASES

One of the first cases at the appellate level was Military Sealift Command v. FLRA at the Third

Circuit.<sup>136</sup> The case arose over the negotiability of wages of civilian mariners employed by the Military Sealift Command (MSC). The court engaged in a lengthy discussion of wages as a "condition of employment" and concluded that they were not. This conclusion was reached by a review of some of the all-encompassing statements of Congressmen previously discussed herein. The court also based this conclusion on the grandfather clause of the Prevailing Wage Rate Act. The court stated:

Congress would not have included or continued [a saving clause] in the prevailing rate system unless a need to explicitly preserve collective bargaining for certain employees existed. The continuing existence of [a saving clause] in the prevailing rate law implies that the prevailing rate system does not encompass collective bargaining and strengthens the presumption against implied repeal as does the insertion of [a saving clause] in the Labor-Management Statute.<sup>137</sup>

The court recognized the ability of some federal employees to bargain. They viewed the saving clause in the FSLMRS as foreclosing the ability to bargain over wages not only for employees who had not historically bargained over wages, but all other federal employees unless specifically authorized under the prevailing rate system. The court did not have to reach so broad a rationale in this case as civilian mariners had not

historically negotiated over their wages.<sup>138</sup> If the court had found wages to be a "condition of employment", negotiations over wages for these employees would still have been foreclosed since they had not traditionally enjoyed such a right prior to 1972.<sup>139</sup>

One issue raised by the court and not previously discussed involves the discretion given to an agency to set pay rates. The statute provides "the pay of officers and members of crews of vessels . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."<sup>140</sup>

The FLRA held that the above pay statute because it vested discretion in the Navy, and that discretion was not "sole and exclusive", was subject to collective bargaining. The rationale of the FLRA is that:

Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees . . . except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.<sup>141</sup>

As the Third Circuit noted, the "FLRA reaches this result by denying a statutory grant of discretion the status of law and equating its exercise with a rule or regulation unless it finds the grant of discretion is 'sole and exclusive'."<sup>142</sup> The court did not, however, find it necessary to determine whether this test was either properly applied or had any utility in defining the scope of bargaining.<sup>143</sup> The court found that the statute did vest ultimate discretion to set rates of pay in the Secretary of the Navy. The court's rationale was based on its determination that wages were not a "condition of employment" and thus the FSLMRS did not authorize collective bargaining for federal employees over pay and pay practices. They found the language of the statute to vest discretion in the Navy to determine the public interest in setting mariners' wages.<sup>144</sup>

If the court had found that wages were a "condition of employment" it could have excluded this statute from collective bargaining under the rationale that these employees had not historically bargained over their wages under the prevailing rate system. Absent, the "sole and exclusive discretion" test, the court could still have excluded the statute from bargaining if it found that wages of civilian mariners were "specifically provided for by Federal statute." In other words, the statute specifically provides that the Secretary of the Navy will set the wages as nearly as consistent with prevailing wages, and if necessary balance the public interest. As noted, however, the

court gave no guidance on the "sole and exclusive discretion" test.

The D.C. Circuit in Dept. of Treasury, Bureau of Engraving and Printing v. FLRA was faced with a pay statute under the prevailing wage system concerning the pay of electricians that contained identical language to the mariners pay statute in Military Sealift.<sup>145</sup> In a nonedifying opinion the D.C. Circuit found the Third Circuit's reasoning to be entirely persuasive and adopted it.

#### B. STATUTORY PAY SCHEME

The Fourth Circuit in Nuclear Regulatory Commission v. FLRA also found that wages were not a "condition of employment."<sup>146</sup> The court additionally determined that the union's salary proposal conflicted with the Atomic Energy Act (AEA) and was therefore nonnegotiable. The court relied upon the fact that an agency does not have an obligation to bargain over proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation."<sup>147</sup>

The Nuclear Regulatory Commission (NRC) was given a statutory grant of discretion over the pay rates of its employees if the NRC deemed it necessary to exercise such discretion.<sup>148</sup> The FLRA contended that because of that grant of discretion, the obligation to bargain was not inconsistent with the statute. The court disagreed noting that the "AEA specifically limits the NRC's discretion and the agency may deviate from the general civil service laws only 'to the extent

the Commission deems such action necessary to the discharge of its responsibilities'." <sup>149</sup> The court agreed with the NRC that the AEA provides "no discretion to depart from General Schedule pay rates is allowed until the Commission makes a finding that the departure is necessary to the discharge of its responsibilities and then such departure can only be to the extent necessary to discharge its responsibilities." <sup>150</sup>

The issue of whether the agency had "sole and exclusive discretion" over the pay rates of its employees did not arise in this case. The FLRA's position seemed to be that if the agency had any discretion at all, whether or not it was "sole and exclusive", then the agency was required to bargain over wages. It should be noted that not all of the Fourth Circuit is in agreement with the above opinion. In fact, the opinion of the court en banc vacated its own panel decision that wages were a "condition of employment" and that bargaining over wages was not inconsistent with the AEA. The court sitting en banc also reversed the panel's opinion that the bargaining of wages did not interfere with the management's right to decide its budget. This was discussed herein, that the union's proposal would have obligated the NRC to adjust its employees wages each time the Advisory Committee on Federal pay recommended a salary increase.

If the court had found that wages were a "condition of employment" they still might have found the proposal to be nonnegotiable based on the AEA being an inconsistent federal law, or that the proposals



interfered with the management's right to set their budget.

### C. TEACHER'S SALARIES

The last group of cases all concern the salaries of school teachers employed either by the Department of Defense or the Department of the Army. The Department of Defense school teachers have not been successful in advancing the argument that their wages should be negotiable. The D.C. Circuit's only basis for opinion was that wages were not a "condition of employment" and therefore not subject to the duty of collective bargaining.<sup>151</sup> It should be noted that the argument in this case concerned overtime wages, as the statute covering the pay of Department of Defense Dependents Schools (DODDS) teachers is very explicit that their pay shall be the same as that in the District of Columbia.<sup>152</sup> If the court had determined that wages were a "condition of employment" they still might have found the issue of overtime to be nonnegotiable as it was inconsistent with federal law. It is a reasonable argument that "compensation, tenure, leave, hours of work, and other incidents of employment" is broad enough to cover not only the base pay of these teachers but also overtime pay.

The school teachers under the Department of the Army have been much more successful in their quest to make their salaries negotiable. The Eleventh and Second Circuits, in Fort Stewart Schools v. FLRA and West Point Elementary School Teachers v. FLRA

respectively, have ruled that wages are a "condition of employment" and have determined teachers' salaries to be a proper subject for negotiation. The Sixth Circuit in Fort Knox Dependent Schools v. FLRA has ruled contrary, but contained a strong dissent echoing the theme that wages are indeed negotiable.<sup>153</sup>

The pay statute in question in these cases is not under the prevailing rate act. 20 U.S.C. Section 241 authorizes the operation of what are commonly referred to as Section 6 schools for children living on federal property, including children of members of the armed forces. Section 241 requires that the Army "to the maximum extent practicable" provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free education in local communities.<sup>154</sup>

The Second Circuit found the above statute did not provide for teachers' salaries. They continued:

Indeed, cost parity may be maintained despite wide variations in what teachers are paid. Similarly, educational comparability may be maintained even with wide variations in teachers' pay. Because section 241 does not specifically establish compensation, the Army has the duty under 5 U.S.C. section 7117(a) to bargain in good faith over the salary schedules for teachers.<sup>155</sup>

The Army argues that the language of the statute does set the compensation for these employees, because

the Army is required to compensate the dependents schools' employees according to local practice. It is a difficult argument that providing a comparable education at the same cost per pupil rate of free public education in local communities "to the maximum extent possible" requires identical teacher salaries. As Justice Scalia noted in arguments in the Fort Stewart case, the requirement that education and expenditures be comparable to local civilian schools offers a lot of room to maneuver because comparable is not identical. He observed, "There's a lot of room for bargaining within the playpen of comparability."<sup>156</sup>

Both the Fort Stewart and Fort Knox cases asserted that proposals to negotiate over wages were inconsistent with Army regulations for which there was a compelling need.<sup>157</sup> The Army argues that the statute is essentially nondiscretionary in mandating teachers salaries identical to the local community. Thus the regulation is implementing a mandate to the agency which is nondiscretionary in nature, and therefore establishes a compelling need for the regulation.

This argument was rejected in both cases for the obvious reason that the courts did not find the language of the statute to be nondiscretionary. In fact, in the Fort Stewart case the court reviewed the legislative history of the pay statute and found that the Army had requested an amendment to the statute in 1965 to pay its teachers in accordance with the entire teaching profession.<sup>158</sup> This was in response to a 1959 Comptroller General decision which stated that the Army

could not compensate its teachers according to the salaries in a neighboring city.<sup>159</sup>

Both the Eleventh and Second Circuits also rejected the argument that negotiating over wages interfered with the agency's right to set its budget. As discussed previously herein, no agency has provided any data to the FLRA to show that such increases would be significant and unavoidable. Both Circuits therefore gave deference to the conclusion of the FLRA that the Army failed to make the requisite demonstration of interference with their budget.

The dissent in the Fort Knox case is the only opinion to date to recognize the distinction between salary schedules under the prevailing wage rate determinations and other statutory or regulatory pay schemes. The dissent noted that the courts in Military Sealift and Department of Treasury both held that wages were exempt from bargaining. The court in Department of Defense Dependent School v. FLRA relied on those two decisions to find that the legislative history indicated that Congressional intent was to exempt pay from negotiability. The dissent stated: "[I]n my judgment, that decision underestimated the importance of the Prevailing Rate Acts in the Sealift and Treasury decisions. The Prevailing Rate Acts are what rendered wages unbargainable in those cases, not the court's interpretation of the FSLMRS."<sup>160</sup> The dissent found that West Point was a more sensible decision and was more consistent with the relevant legislative history. Thus the dissent found wages to be a "condition of employment" and found no compelling need for the Army's

regulation as it was not implementing a nondiscretionary mandate.

#### VIII. CONCLUSION

The one inescapable conclusion is that Congress intended wages to be a "condition of employment." Every decision which has held otherwise has not examined all of the available evidence. It is easy to take a few statements from the legislative history of the Federal Service Labor-Management Relations Statute and contend that this was not the intent of Congress. The correct approach is to examine all of the statements made during passage of the FSLMRS, as well as prior case law under the FLRC, and the history of bargaining in the federal service prior to 1978. A review of all the relevant legislative history clearly shows the development of the two part analysis in determining whether any issue is a proper subject for negotiation.

Wages are a "condition of employment", and therefore subject to negotiation unless they are "specifically provided for by Federal statute" or would be inconsistent with federal law or a government-wide rule or regulation, or an agency-wide rule or regulation for which a compelling need exists. Finally, wages would not be subject to negotiation if they interfered with a management right, such as the right of an agency to determine their budget.

If the Supreme Court determines in the Fort Stewart case that wages are a "condition of employment"

it is unlikely that an examination of the pay statute the Department of Army schools operates under would show an inconsistent federal statute. Thus it is unlikely that the Army can show a compelling need for its regulation if no nondiscretionary mandate must be implemented from the statute. Further, since no evidence was presented by the agency on the issue of interference with the management's right to determine the budget, it is likely that the court will defer to the prior conclusion of the FLRA that the agency failed to demonstrate such interference.

In the very beginning of this paper the proposition was made that the cases at the appellate level were divided. This is correct. The cases are divided in their rationale and divided in the results. If the Supreme Court decides that wages are a "condition of employment" the appellate courts will be forced to reconsider their opinions. If all the cases have to accept that wages are a "condition of employment" and therefore subject to negotiation, it is still possible that the results of the cases will remain the same. Cases such as the Military Sealift Command could demonstrate that the wages of the employees were not previously negotiable under the prevailing wage acts and so are now foreclosed from doing so. The Department of Defense Dependents Schools could show that their statute would make bargaining inconsistent with federal statute as they are mandated to have the same salaries for overseas teachers as the salaries for teachers in the District of Columbia. The future of bargaining by the electricians in the Nuclear

Regulatory Commission case depends upon the guidance of the court in the Fort Stewart case on how much discretion is allowed an agency before they must negotiate wages. How specific is "specifically provided for by Federal statute?"

The Supreme Court does not have to reach the question of the importance of the prevailing rate acts in the Fort Stewart case. They do not have to reach the question of the "sole and exclusive discretion" test. If the Supreme Court merely defers to the conclusion of the FLRA on the agency's right to determine their budget, they do not have to reach the balancing test of significant and unavoidable costs versus compensating benefits.

While a decision that wages are a "condition of employment" would certainly make many agencies examine how they do business with regard to negotiation with employees over wages, it is possible that very few of them would actually have to change the way they do business. Even the FLRA, which has been the most outspoken proponent of the theory that wages are a negotiable "condition of employment", concedes that few of the employees under pay schemes not entirely set by statute would be able to bargain over wages. Many of the pay schemes contain specific standards which the agencies have to meet.<sup>161</sup>

The main impact of a decision in the Fort Stewart case that wages are a negotiable "condition of employment" would be that agencies subject to pay schemes not entirely set by statute would have to carefully examine the language and history of their

individual pay statutes. Those courts which have previously relied upon the assertion that wages are simply not negotiable will have to determine whether the pay schemes they have examined are now negotiable because they do not meet the second part of the analysis.

The teachers who are employed by the Department of the Army will more likely than not be able to negotiate over their wages. The remedy for the Army, if this is not a desirable option, is of course to appeal to Congress to change the pay statute. The salaries of dependent school teachers would have to be mandated by Congress so that the Army had no discretion in the matter. The other option is that the pay of dependent school teachers be aligned with the civil service grades, and thus covered by the General Schedule.<sup>162</sup>

If indeed the Supreme Court declares wages to be a negotiable "condition of employment", and from the tenor of argument before the court it appears likely they will, the negotiability of wages will impact a variety of agencies and employees for many years to come. Those who previously attempted to negotiate over wages, but were unsuccessful, will want to try again. Those who thought they were foreclosed from bargaining over wages may want to reconsider.



1. Fort Knox Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989), petition for cert. filed, (U.S. Nov. 7, 1989) (No. 89-736); Department of Defense Dependents Schools v. FLRA, 863 F.2d 988 (D.C. Cir. 1988) reh'g en banc granted Feb. 6, 1989; Fort Stewart Schools v. FLRA, 860 F.2d 396 (11th Cir. 1989), cert. granted 110 S.Ct. 47 (1989) (argued Jan. 10, 1990); Nuclear Regulatory Commission v. FLRA, 859 F.2d 302 (4th Cir. 1988), petition for cert. filed, (U.S. Aug. 3, 1989) (No. 89-198), reh'g granted 879 F.2d 1225 (4th Cir. 1989), petition for cert. filed, (U.S. Oct. 6, 1989) (No. 89-562); West Point Elementary School Teachers Assoc. v. FLRA, 855 F.2d 936 (2d Cir. 1988); U.S. Dept. of Defense Dependent Schools v. FLRA, 838 F.2d 129 (4th Cir. 1988); Dept. of the Treasury v. FLRA, 838 F.2d 1341 (D.C. Cir. 1988); Navy Military Sealift Command v. FLRA, 836 F.2d 1409 (3d Cir. 1988); AFGE and AF, 24 FLRA 377 (1986).

2. 5 U.S.C. § 7103(a)(14).

3. 5 U.S.C. § 7106(a).

4. 5 U.S.C. § 7117.

5. Supra, note 1.

6. Fort Stewart Schools v. FLRA, 860 F.2d 396 (11th

Cir. 1989), cert. granted, 110 S.Ct. 47 (1989) (argued Jan. 10, 1990).

7. 5 U.S.C. § 701.

8. 5 U.S.C. § 7101 (emphasis added).

9. 5 U.S.C. § 7103(a)(12) states: "'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession".

10. Id.

11. American Fed'n of Gov't Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980).

12. 5 U.S.C. § 7103 (a)(14).

13. 5 U.S.C. § 7117 states: " (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of

any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by an agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

See FLRA v. Aberdeen Proving Ground, Dept. of the Army, 108 S.Ct. 1261 (1988).

14. 5 U.S.C. § 7106.

15. 5 U.S.C. § 7105(a)(2)(E). The FLRA is created under 5 U.S.C. § 7104 and is empowered to "conduct investigations and to provide for hearings" under 5 U.S.C. § 7105(e)(1)(B). The FLRA will appoint Regional Directors and Administrative Law Judges for the proper performance of these functions, 5 U.S.C. § 7105(d).

16. 5 U.S.C. § 7117(c)(1).

17. 5 U.S.C. § 7123.

18. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983).

19. 5 U.S.C. § 7119(b).

20. 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall), reprinted in Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 923 (1979) [hereinafter Legislative History].

21. 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978)  
(remarks of Rep. Ford), Legislative History at 855-56.

22. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 12  
(1978), Legislative History at 682. In the  
supplemental views accompanying the House Report,  
committee member stated:

Those of our colleagues who are concerned that this  
bill will significantly expand the collective  
bargaining rights of federal employees need not worry.  
It does not. Enactment of the committee approved  
labor-management title will continue to deny to Federal  
employees most of the collective bargaining rights  
which their counterparts in the private sector have  
enjoyed for over 40 years. Among the collective  
bargaining rights not included in this bill are: . . .

(2) The right to bargain collectively over pay and  
money-related fringe benefits such as retirement  
benefits and life and health insurance. . . .

Supplemental Views to H.R. 11280, Legislative History  
at 721.

The Senate Report accompanying S.2640 states:  
S.2640 incorporates into law the existing federal  
employees relations program. At the same time, S.2640  
recognizes the special requirements of the Federal  
government and the paramount public interest in the  
effective conduct of the public's business. It insures  
to federal agencies the right to manage government  
operations efficiently and effectively. . . . The bill  
permits unions to bargain collectively on personnel  
policies and practices, and other matters affected

- working conditions within the authority of agency managers. . . . It excludes bargaining on economic matters. . . . S. Rep. No. 95-969, 95th Cong., 2d Sess. 12-13 (1978), U.S. Code Cong. & Admin. News, 1978, pp. 2723, 2734-35, Legislative History at 839.
23. 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay), Legislative History at 933 (emphasis added).
24. Dept. of Navy, Military Sealift Com. v. FLRA, 836 F.2d 1409, 1417 (3rd Cir. 1988).
25. Fort Stewart Schools v. FLRA, 860 F.2d 396, 402 (11th Cir. 1988).
26. 5 U.S.C. § 5331 et seq.
27. 28 Gov't Emp. Rel. Rep. (BNA) 59 (Jan. 15, 1990).
28. Fort Stewart, 860 F.2d at 402.
29. 124 Cong. Rec. 25,721 (1978)
30. Legislative History at 1087-88, proposing a new § 7115(b).
31. INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (citations omitted), Petitioners' Brief at 21, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).
32. Respondent's Brief (FLRA) at 28, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).
33. 124 Cong. Rec. E4293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay), Legislative History at 839.

34. 124 Cong. Rec. H9639 (daily ed. Sept. 13, 1978) (remarks of Rep. Devinski), Legislative History at 935.
35. Fort Stewart Schools v. FLRA, 860 F.2d at 402.
36. Act of Oct. 28, 1949, ch. 782, 201, Pub. L. No. 81-429, 201, 63 Stat. 954.
37. U.S. Dept. of Energy, Western Area Power Administration, Golden, Colorado and IBEW Locals 640, et al., 22 FLRA 758, 802-803 (1896).
38. President's Task Force on Employee-Management Relations in the Federal Service, A Policy for Employee-Management Cooperation in the Federal Service (1961), reprinted in Legislative History at 1177, 1187.
39. Id. at 1200.
40. Id. at 1201 (emphasis added).
41. Id. at 1178.
42. Respondent's Brief (Fort Stewart Association of Educators) at 13, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).
43. Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 4269, 4271. Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969).
44. Executive Order 11,491, Section 4.
45. United Fed'n of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 (1972).

46. Overseas Educ. Assoc., Inc. and Dept. of Defense Dependents Schools, 6 FLRC 231 (1978).
47. 124 Cong. Rec. 29,188 (1978).
48. S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News at 2826.
49. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 103 (1983).
50. 124 Cong. Rec. 29,187 (1978). See also Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices."). 124 Cong. Rec. 25,777 (1978) (remarks of Rep. Ford that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order.").
51. Petitioner's Brief at 25, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).
52. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 108 S.Ct. 1704, 1711-12 (1988); Director, OWCP v. Perini North River Associates, 459 U.S. 297, 319-20 (1983).
53. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).
54. Fort Stewart Schools v. FLRA, at 402.
55. 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford), Legislative History at 857. Rep. Ford stated: During committee markup, I offered an amendment to add a new provision, section 704(c),



which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. This includes certain trade and craft employees of the Department of Interior, and those trade and craft employees in units or portions of units, transferred, effective October 1, 1977, from the Department of the Interior to the Department of Energy. This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

Certainly, we should not now be narrowing the preexisting collective bargaining practices of any group of Federal employees. This provision of the bill would have the effect of overruling the two Comptroller General decisions, and would adopt his own suggestion for specific legislative authorization. The provision would specifically authorize the continuation of prior collective bargaining practices, and would allow these employees, whom Congress already sought to protect in the savings provision of 1972 wage board reform law, to continue to negotiate their term and conditions of employment in accordance with the prevailing practice principle. I do not intend to expand or contract the scope of bargaining that existed prior to the Comptroller General decisions.

56. Pub. L. No. 92-392, § 9(b), 86 Stat. 564 (1978)  
(reprinted in 5 U.S.C. § 5343 note (1982)). § 9(b)  
provides:

The amendments made by this Act shall not be construed  
to--

(1) abrogate, modify, or otherwise affect in any  
way the provisions of any contract in effect on the  
date of enactment of this Act [Aug. 19, 1972]  
pertaining to the wages, the terms and conditions of  
employment, and other employment benefits, or any of  
the foregoing matters, for Government prevailing rate  
employees and resulting from negotiations between  
Government agencies and organizations of Government  
employees[.]

57. Pub.L. No. 95-454, § 704, 92 Stat. 1218 (1978). §  
704 provides:

(a) Those terms and conditions of employment and  
other employment benefits with respect to Government  
prevailing rate employees to whom § 9(b) of Public Law  
92-392 applies which were the subject of negotiation in  
accordance with prevailing rates and practices prior to  
August 19, 1972, shall be negotiated on and after the  
date of the enactment of this Act in accordance with  
the provisions of § 9(b) of Public Law 92-392 without  
regard to any provision of chapter 71 of title 5,  
United States Code (as amended by this title), to the  
extent that any such provision is inconsistent with  
this paragraph.

(b) The pay and pay practices relating to

employees referred to in paragraph (1) of this subsection shall be negotiated . . .

58. 124 Cong. Rec. H466 (daily ed. Aug. 11, 1978) (remarks of Rep. Clay), Legislative History at 853.

59. 28 Gov't Emp. Rel. Rep. (BNA) 59-60 (Jan. 15, 1990).

60. 5 U.S.C. § 7103(a)(14).

61. 29 U.S.C. § 158(d).

62. Dept. of Navy, Military Sealift Com. v. FLRA, at 1417.

63. 39 U.S.C. § 1201 note (Labor Agreements).

64. 29 U.S.C. § 151.

65. 29 U.S.C. Sec 159(a).

66. Roget's International Thesaurus 383 (4th ed. 1977); Webster Encyclopedia Dictionary, Dictionary of Synonyms and Antonyms 16 (1980 ed.)

Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702, 714 (1982) (identifying wages, among other things, as being at the core of "terms and conditions of employment").

Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir), cert. denied, 351 U.S. 909 (1956) (a stock purchase plan constituted "wages" and qualified as "conditions of employment"). Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (a retirement and pension plan qualified as wages and conditions of employment). Weyerhaeuser Timber Co., 87

NLRB 672 (1949) (employer furnished meals were wages and conditions of employment).

Amicus Curiae Brief (National Treasury Employees Union in support of Respondents) at 10, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

67. 5 U.S.C. § 3131(1).

68. 18 U.S.C. § 4082(c)(2)(iii).

69. Petitioner's Brief at note 9, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

70. Supra note 12.

71. Supra note 40.

72. Supra note 41.

73. Executive Order 10,988, § 6(b), Legislative History at 1214.

74. Executive Order 11,491, § 11(a), Legislative History at 1250.

75. Supra notes 45 and 46.

76. Florida National Guard v. FLRA, 699 F.2d 1082, 1087 (11th Cir. 1983); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir. 1981). Respondent's Brief (Fort Stewart Ass'n of Educators) at 16, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, argued Jan. 10, 1990.

77. Petitioner's Brief at 17, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, argued Jan. 10, 1990.

78. Dept. of Defense Dependents Schools v. FLRA, 863 F.2d 988, 990 (D.C. Cir. 1988).
79. Respondent's Brief (Fort Stewart Ass'n of Educators) at 11, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).
80. Supra note 18.
81. Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97, 104 S.Ct. 439, 444 (1983) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1149 (1963)).
82. 5 U.S.C. § 706(2); New York Council Ass'n v. FLRA, 757 F.2d 502, 507 (2d Cir.), cert. denied, 474 U.S. 846, 106 S.Ct. 137 (1985).
83. 5 U.S.C. § 7123(c).
84. Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. at 97, 104 S.Ct. at 444.
85. Shanty Town Assoc. Ltd. v. EPA, 843 F.2d 782, 790 n. 12 (4th Cir. 1988).
86. U.S. Dept. of Health and Human Services v. FLRA, 833 F.2d 1129, 1135 (4th Cir. 1987).
87. 28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).
88. Id.
89. Id.
90. Respondent's Brief (FLRA) at 22, note 10, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990). "Research discloses no court or

National Labor Relations Board decision in the 54-year history of the NLRA which parses the relevant phrase in § 8(d) between 'terms' and 'conditions' of employment."

91. 5 U.S.C. § 7106(a)(1).

92. 124 Cong. Rec. 29,187 (1987).

93. H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978), Legislative History at 690.

94. Executive Order No. 10,988, § 6(b), 27 Fed. Reg. 551 (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 4269, 4271.

95. Executive Order 11,491, § 11(b), 43 Fed. Reg. 17605 (1969), reprinted in 1969 U.S. Code Cong. & Ad. News 2954.

96. 124 Cong. Rec. 29,198, 29,199 (1978).

97. Dept. of Defense v. FLRA, 659 F.2d 1140, 1159 (D.C. Cir. 1981), cert. denied 455 U.S. 945 (1982).

98. EEOC v. FLRA, 744 F.2d at 848-49, quoting 124 Cong. Rec. 29,199 (1978) (remarks of Rep. Ford), Legislative History at 956.

99. American Fed'n of Gov't Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 607 (1980), [hereinafter Wright-Patterson].

100. American Fed'n of Gov't Employees, AFL-CIO v. FLRA, 785 F.2d 333, 337-38 (D.C. Cir. 1986).

101. Wright-Patterson at 607-08. The full explanation of the Wright-Patterson test follows:

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition. As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and operations which will be included in the estimate of proposed expenditures and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is

alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

102. Wright-Patterson at 608.

103. Nuclear Regulatory Comm'n v. FLRA, 859 F.2d 302 (4th Cir. 1988); West Point Elementary School Teachers v. FLRA, 855 F.2d 936 (2d Cir. 1988); and Fort Stewart Schools v. FLRA, 860 F.2d 396 (11th Cir. 1988).

104. 5 U.S.C. § 7123(c).

105. Respondent's Brief (FLRA) at 38, note 28, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

106. Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225 (4th Cir. 1989).

107. Petitioner's Brief at 30, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

108. 28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).



109. Id.

110. See, e.g. Executive Order 12,291, 3 C.F.R. 127 (1982) (federal agencies must perform cost/benefit analysis, including non-quantifiable costs and benefits, in determining whether to issue a major rule); P. Butler, Employer-Sponsored Recreational Activities: Do the Costs Outweigh the Benefits?, 39 Labor Law Journal 120 (1988); Respondent's Brief (FLRA) at 38, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

111. 28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

112. Wright-Patterson at 608.

113. Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225 (4th Cir. 1989).

114. Fort Stewart Schools v. FLRA, 860 F.2d 396, 405-06 (11th Cir. 1988).

115. Petitioner's Brief at 29, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

116. 5 U.S.C. § 7106.

117. 5 U.S.C. § 7103(a)(3).

118. Supra note 19.

119. Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225, 1227 (4th Cir. 1989).

120. Id. at 1232.

121. Id. at 1233.

122. Id. at 1232, quoting National Treasury Employees Union v. FLRA, 691 F.2d 533, 560 (D.C. Cir. 1982).

123. Supra, note 55.

124. 5 U.S.C. § 7103(a)(14)(c).

125. Army and Air Force Exchange Service, Dallas, Texas and AFGE, 32 FLRA 591, 597, 600 (1988).

There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972, and are thus grandfathered by § 704. Office of Personnel Management, Union Recognition in the Federal Government, at 331-32, 351-62, 390 (1987). Respondent's Brief (Fort Stewart Ass'n of Educators), Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, (argued Jan. 10, 1990).

126. See generally, There's More to Federal Pay than the GS Schedule, Wash. Post, Oct. 26, 1982, at A17, col. 1.

127. 5 U.S.C. § 7117(a)(2).

128. Executive Order No. 11,838, 3 C.F.R. 957 (1971-1975 Comp.).

129. 5 U.S.C. § 7117(b)(1).

130. 5 U.S.C. § 7117(a)(2).

131. 5 C.F.R. Sec. 2424.11.

132. Federal Deposit Insurance Corp. v. Philadelphia Gear Corp., 476 U.S. 426, 439 (1986).
133. 5 C.F.R. § 2424.11.
134. AFGE, Local 3804 and Federal Deposit Insurance Corp., Madison Region, 21 FLRA 870, 881 (1986).
135. Supra, note 125.
136. Dept. of Navy, Military Sealift Command v. FLRA, 836 F.2d 1409 (3rd Cir. 1988).
137. Id. at 1420.
138. Id. at 1419, note 19. See Petitioner's Brief at 37, Dept. of Navy, Military Sealift Command, 836 F.2d 1409 (1988).
139. This statutory scheme was recognized in Amell v. United States, 390 F.2d 880 (Ct. Cl. 1968) (No. 387-64) cert. denied, 393 U.S. 852 (1968). The Court stated:  
Plaintiffs are wage board employees. Their wages are not set through collective bargaining negotiations but are fixed by administrative action pursuant to the Federal Employees Pay Act of 1945, 59 Stat. 305, as amended, 5 U.S.C. 946 (1964) and by the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. 1082 (1964).
140. Military Sealift Command, at 1412.
141. National Treasury Employees Union, Chapter 6 and Internal Revenue Serv., 3 FLRA 748, 759-60 (1980).
142. Military Sealift, at 1415.

143. Id.

144. Id. at 1416. The Court agreed with the Court of Claims analysis in *National Maritime Union of America v. United States*, 682 F.2d 944, 949, 231 Ct.Cl. 59 (1962) (footnotes omitted) (emphasis in original), when it stated:

"As nearly as is consistent with the public interest" qualifies or limits the main thrust of the sentence, which is "fixed and adjusted from time to time . . . in accordance with prevailing rates." We may draw two conclusions from this structure. First, the primary purpose of the statute is to ensure that the pay of these employees will be comparable to those in the private sector. Second, the public interest is a consideration placed in opposition to equality of pay. The language "as nearly as is consistent with" anticipates that equality of pay may not always be entirely with the public interest. These countervailing considerations create a kind of tension in the statute which is crucial to the system, as it provides the administrative discretion needed to operate efficiently a wage system.

145. 5 U.S.C. § 5349(a), a section of the Prevailing Rate Act provides:

[t]he pay of employees [including the electricians in question] in . . . the Bureau of Engraving and Printing . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates . . . as the pay-fixing authority of each such agency may determine[.]

146. Nuclear Regulatory Comm'n v. FLRA, 879 F.2d 1225 (4th Cir. 1989), petition for cert. pending, Nos. 89-108 and 89-562.

147. Id. at 1233, quoting 5 U.S.C. § 7117(a)(1).

148. Atomic Energy Act, § 161(d) provides that the NRC is authorized to:

appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with [the Classification Act of 1949], except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and compensation fixed without regard to such laws . . . .

149. Nuclear Regulatory Comm'n, 879 F.2d at 1233.

150. Nuclear Regulatory Comm'n v. FLRA, 859 F.2d 302 (4th Cir. 1988).

151. Dept. of Defense Dependents Schools v. FLRA, 863 F.2d 988 (D.C. Cir. 1988), reh'g in banc granted (Feb. 6, 1989).

152. 20 U.S.C. § 241(a) states:

Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same

basis as provided for similar positions in the public schools in the District of Columbia.

153. Fort Knox Dependent Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989).

154. 20 U.S.C. Sec. 241 (1982) provides:

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property--the Secretary may make such arrangements . . . as may be necessary to provide free public education for such children. Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local government authority and it is the judgment of the Secretary . . . that no local educational agency is able to provide suitable free public education for such children. To the maximum extent practicable, the local agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State. . . . For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed

without regard to the Civil Service Act and rules and the following [citations omitted] . . .

(e) Limits on Payments

To the maximum extent practicable, the Commissioner shall limit the total payments made pursuant to any such arrangement for educating children . . . to any amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State . . . .

155. West Point Elementary School Teachers v. FLRA, 855 F.2d 936 (2d Cir. 1988).

156. 28 Gov't Emp. Rel. Rep. (BNA) 60 (Jan. 15, 1990).

157. Army regulation 352-3.1-7 provides:

Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following facts are, the maximum extent practicable, equal:

- a. Qualifications of professional and non professional personnel.
- b. Pupil-teacher ratios.
- c. Curriculum for grades offered, including kindergarten and summer school, if applicable.
- d. Accreditation by State or other accrediting association.
- e. Transportation services (student and support).
- f. Length of regular and/or summer term(s).
- g. Types and numbers of professional and nonprofessional positions.

- h. Salary schedules.
- i. Conditions of employment.
- j. Instructional equipment and supplies.

158. 1965 U.S. Code Cong. & Admin. News at 1913. The Army commented that the federal pay acts did not accommodate the teaching profession because of the difference between salaries on a school year basis and a calendar year basis. Also teachers receive set pay for extracurricular activities while federal employees receive overtime. The Army concluded:

Based upon the Department's experience in operating dependent schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teacher profession rather than those which have been developed for the Federal Service as a whole.

159. Fort Stewart, 860 F.2d at 403.

160. Fort Knox, 875 F.2d at 1184.

161. Respondent's Brief (FLRA) at 17, Fort Stewart Schools v. FLRA, US Sup Ct No. 89-65, argued Jan. 10, 1990. The FLRA after battling over the pay schemes of numerous employees concedes:

Of the "forty-odd federal pay systems which are not entirely set by statute" referenced in Dept. of Defense Dependents Schools v. FLRA, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989), employees under only a few of those systems would be able to negotiate on compensation under the Authority's



case law. Most of these forty pay systems contain specific standards to be met by agencies in setting pay, thus removing pay determinations from the scope of negotiable agency discretion. See, e.g., American Federation of Gov't Employees and Dept. of Defense, Dept. of the Army and Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas, 32 FLRA 591 (1988) (proposal to increase commission rates nonnegotiable for employees subject to the Prevailing Rate Systems Act).

162. An issue not discussed in this paper is that in *West Point Elementary School Teachers v. FLRA*, 855 F.2d 936 (2d Cir. 1988), the court declared the Army's use of personal service contracts in hiring civilian teachers to be an unlawful hiring practice as the Army did not have specific statutory authority to use such contracts. Thus the Army will have to alter their method of hiring dependent school teachers in any event.